WILDLIFE DAMAGE REVIEW

IBLA 95-61, 95-459 Decided October 4, 1999

Appeals from decisions of the Safford and Phoenix District Managers, Bureau of Land Management, approving predator animal damage control plans for the Safford and Phoenix Districts. EA AZ-040-0-10, EA AZ-026-94-17.

IBLA 95-61 dismissed; IBLA 95-459 affirmed.

1. Animal Damage Control--Environmental Quality: Environmental Statements--National Environmental Policy Act of 1969: Finding of No Significant Impact

   Where appellant has not shown by a preponderance of the evidence that a decision to establish an animal damage control program and finding of no significant environmental impact were premised on a clear error of law or a demonstrable error of fact or failed to consider a substantial environmental question of material significance to the proposed action, and the record shows that the decision is reasonable in light of the environmental analysis, the decision will be affirmed on appeal.

2. Animal Damage Control--Environmental Quality: Environmental Statements--National Environmental Policy Act of 1969: Finding of No Significant Impact

   A failure to conduct a census of target predators does not per se demonstrate a fatally defective flaw in an environmental analysis. Absent a census, the question is whether the means employed to estimate the predator populations is so flawed that the analysis and reasoning must be rejected. Where livestock losses in a BLM District are reasonably well-documented, the public lands are intermingled with State and private lands, the grazing allotments in the District embrace lands of mixed ownership, and appellant has failed to submit objective evidence or scientific authority demonstrating error in BLM's environmental analysis and reasoning, the lack of data regarding losses specific to the public lands is not dispositive.

APPEARANCES: Nancy Zierenberg, Tucson, Arizona, for Appellant Wildlife Damage Review in IBLA 95-61; Joyce Tischler, Esq., Animal Legal Defense Fund, San Rafael, California, and Nancy Perry, Esq., and Richard J. Katz, Esq., Animal Legal Defense Fund, Phoenix, Arizona, for Appellant Wildlife Damage Review in IBLA 95-459; Richard R. Greenfield, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Phoenix, Arizona, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE PRICE

Wildlife Damage Review (WDR) has appealed from two Decisions of the Bureau of Land Management (BLM) approving animal damage control (ADC) plans to control predation in two BLM districts in Arizona. One Decision, issued by the Safford (Arizona) District Manager, approved implementation of an ADC plan for the Safford District analyzed in Environmental Assessment AZ-040-0-10 (SEA). The Safford District Manager signed the Decision Record and Finding of No Significant Impact (FONSI) for the SEA on August 3, 1994. The appeal of the Safford Decision was docketed as IBLA 95-61. In the other Decision, the Phoenix District Manager approved ADC for the Phoenix District as analyzed in EA AZ-026-94-17 (EA) and the accompanying Record of Decision and FONSI signed on June 15, 1994. The Board docketed the appeal of the Phoenix Decision as IBLA 95-459. Because of the factual and legal similarities between the two cases as argued by the parties, 1/ the appeals were consolidated for review.

As a preliminary matter, the Board must address BLM's assertion that Appellant lacks standing to challenge the Safford District Decision. (Safford Answer at 4-6.) On November 3, 1993, the Safford District Office mailed a draft of the annual plan of work, prepared by and for BLM and the Animal and Plant Health Inspection Service of the U.S. Department of Agriculture (APHIS), 2/ to each person and organization on its District ADC mailing list. Recipients were asked to review the draft and submit issues they believed should be addressed in the EA, either in writing or at one of two scheduled scoping meetings. WDR received a copy of the draft plan, and on November 26, 1993, submitted comments. As a result, Appellant is a party to the case. Mark S. Altman, 93 IBLA 265, 265-66 (1985), and cases

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1/ The parties filed pleadings in both appeals in which only the initial docket number, IBLA 95-61, was referenced, although they further identified their papers by referring to the respective EA numbers.

2/ The Secretary of Agriculture, acting through APHIS, is authorized and directed by the Animal Damage Control Act of Mar. 2, 1931, as amended, 7 U.S.C. § 426 (1994), to conduct campaigns to destroy or control wild animals injurious to agriculture and livestock in national forests and other areas of the public domain. See, e.g., Southern Utah Wilderness Alliance v. Thompson, 811 F. Supp. 635, 638 (D. Utah 1993). Animal damage control on public lands was transferred from the U.S. Fish and Wildlife Service (FWS) to APHIS on Dec. 19, 1985. 51 Fed. Reg. 6290 (Feb. 21, 1986).

cited therein. BLM contends, however, that Appellant lacks standing to appeal because it has not alleged that it was adversely affected by the Safford Decision. 43 C.F.R. § 4.410. 3/

In its SOR for appeal of the Safford Decision (SOR-Safford), Appellant states that WDR was "formed to bring public scrutiny to the ADC program * * *. We represent a growing constituency of over 500 people in the state of Arizona, and an apparently unknown number of predators, all of which are directly affected by this proposed program." (SOR-Safford at 1.) This general allegation that WDR members are "directly affected" by the program constitutes WDR's only reference to, and showing of, adverse impact upon WDR. However, WDR's deep concern for ADC issues, absent colorable allegations of adverse effect, is insufficient to confer standing. Powder River Basin Resource Council, 124 IBLA 83, 89 (1992). To be "adversely affected" by a decision, the record must show that appellants have a legally cognizable interest, which need not be an economic or a property interest; use of the land involved or ownership of adjoining land may establish such an interest when it has been adversely affected. Mark S. Altman, supra at 266; Donald Pay, 85 IBLA 283, 285-6 (1985); Sharon Long, 83 IBLA 304, 308 (1984). Accordingly, the appeal of the Safford Decision in IBLA 95-61 is dismissed for lack of standing. 43 C.F.R. § 4.410(a).

Turning to the merits of the Phoenix Decision, we note that prior to issuance of the Decision, BLM had no formal operating plans for predator control on the public lands. Livestock operators carried out predator control actions themselves, or they requested action from BLM, in coordination with the State and APHIS, as provided by the BLM Manual Part 6830. (EA at 2, 12.) In 1993, the BLM Director called for the preparation of ADC plans and supporting environmental analyses pursuant to the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321-4379 (1994). (BLM Instruction Memorandum 93-107 dated January 21, 1993.) As a result of the lack of a formal ADC program in prior years, however, BLM had not collected data regarding predation on the public lands. (Answer at 11, 13.)

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3/ BLM does not dispute Appellant's standing to appeal the Phoenix Decision. Appellant established itself as a party to that case by providing detailed scoping comments on Jan. 21, 1994, and claiming use of Phoenix District lands for recreation and recreational interests specific to that District, stating that "WDR membership and staff live in or near the [Phoenix] District, and as such, they currently visit, hike through, photograph, utilize and enjoy the biological, recreational and aesthetic values of the areas inhabited by the predators in the District and appreciate the complex interactions of species within this ecosystem and will continue to do so." (Statement of Reasons (SOR) at 5.) Appellant clearly has standing to challenge the Phoenix Decision appealed in IBLA 95-459.

The Phoenix District Decision and FONSI determined to implement the proposed ADC action to establish a program to control livestock depredation in the manner reflected in the proposed Annual Operating Plan (Plan) developed by BLM and APHIS personnel. Mountain lions and coyotes are the principal target species. (EA at 23.) The Plan provides for corrective predator control in response to a verified loss of livestock targeted at the individual bears, mountain lions and bobcats responsible for the loss, because these species characteristically hunt and feed as individuals. In the case of coyotes, corrective control efforts would be directed at the coyote population in the area where the loss occurred for a reasonable time following the loss, because the species hunts and feeds differently. (Answer at 20.) The essential features of the Plan are: (1) corrective control is the primary objective; (2) corrective control will not be provided unless a livestock operator has requested it and the loss is verified; (3) preventive control is not presently planned, but may be provided after 2 years to collect baseline information, if it is requested by a livestock operator, but only if it is deemed necessary by APHIS and BLM; (4) APHIS and BLM will closely coordinate their activities; (5) lethal and nonlethal methods are authorized, although M-44 devices are to be used as a last resort, and only against coyotes; (6) the discretion to decide what method(s) are appropriate to the circumstances is vested in ADC personnel; (7) ADC activities shall be subject to various restrictions and conditions, including protection of endangered species and use of livestock management practices; and (8) emergency ADC is authorized if requested, and is subject to a specified procedure on a case-by-case basis. Control activities would be limited or prohibited as appropriate in areas of high public use, wilderness, and certain special species habitat, and Plan implementation would be subject to monitoring and annual review. The level of APHIS' response in a particular area depends upon the execution of cooperative agreements with county governments and livestock associations and funding for those areas. (EA at 2.) Implementation of the Plan would not affect sport hunting or the rights of livestock operators to control predators under State law. (EA at 2, 18-19, 23-24.)

In addition to the proposed action, the EA considered and analyzed two other alternatives in detail. Alternative 2 proposed control on an emergency basis only, while Alternative 3 proposed no action, defined as no BLM-authorized control program on public lands. Alternative 1, the preferred action, includes emergency procedures which would permit APHIS personnel to implement control activities immediately without BLM approval, whereas pursuant to Alternative 2 APHIS could unilaterally decide to proceed with control activities only in cases where human health and safety are at risk. All other activities would require BLM's prior approval of the action. (EA at 11.) A fourth alternative, taste aversion, was considered but not analyzed in detail. That alternative proposed to condition predators to avoid specific prey species by repeated exposures to vile-tasting substances, but was rejected because it is best suited to pastured sheep operations where prey animals remain in confined areas. In contrast, the livestock operations here at issue are open range operations where livestock and predators roam over large areas. (EA at 5.)

Appellant objects to adoption of the program and challenges the FONSI, arguing that it was based upon an inadequate EA. Appellant further asserts that BLM did not demonstrate the need for predator control on BLM land or the inclusion of lethal control methods. More particularly, WDR faults BLM's reliance on data that pertains to land other than the lands administered by BLM, and contends that such data fail to show a need for ADC on BLM land. Appellant argues, moreover, that BLM has not shown the need for, or effectiveness of, preventive control on local coyote populations. Appellant also asserts that the EA is defective because it did not adequately consider nonlethal alternatives, such as specifically conditioning grazing permits on better animal husbandry, taste aversion, and relocation of individual animal offenders. (SOR at 17-19.) Appellant urges that BLM did not adequately analyze the cumulative impacts of the Plan, particularly on special status species, and did not adequately address monitoring. (SOR at 19-21.) In its Reply, Appellant makes the further argument that Arizona law proscribes the use of some of the lethal methods allowed in the Plan, such that BLM should be required to draft an ADC plan that complies with State law. (Reply at 11-12.) Thus, Appellant regards the Plan as violative of the multiple-use mandate in the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1701(8) (1994), and seeks a reversal of the Decision and FONSI and asks this Board to require BLM to prepare an EIS. (SOR at 3-4, Reply at 10.)

BLM responds that it considered all relevant areas of environmental concern and that the FONSI is reasonable. BLM admits that it lacks data regarding predation on the public lands as a result of the lack of an ADC program in the past, but nonetheless maintains that predation data relating to State and private lands can properly serve as the basis for sound inferences regarding predation on BLM lands, because the lands are intermingled and utilized by livestock owners and operators on an allotment basis. (EA at 6, 14.) Thus, BLM argues that it based its proposals on the best available data. From BLM's perspective, Appellant's arguments proceed from a failure to distinguish between corrective and preventive control as these concepts are defined in the EA. BLM asserts that the nonlethal options Appellant suggests would be ineffective for the purpose of eliminating the offending animal(s) targeted in corrective control, although ADC personnel are "free to use whatever technique is appropriate to the specific situation at hand, except as may be restricted by the proposed action," including nonlethal techniques. (Answer at 15-17.)

BLM further argues that, contrary to Appellant's contentions, the EA contains an analysis of cumulative impacts of the preferred action (EA at 21-29, 33-34), including impacts on special status species (EA at 27-29), and concludes that Appellant has failed to carry its burden of showing that the FONSI determination was based upon a clear error of law or a demonstrable error of fact. (Answer at 24-28.) Although BLM maintains that sufficient data to support the Decision are presented in the EA, with its response to Appellant's Reply, 4/ BLM submitted national

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4/ BLM's pleading in response to WDR's Reply was styled Respondent's Reply, but we will refer to it as the BLM Reply.

predation statistics, including information pertaining to Arizona, as additional support for the conclusions in the EA. (BLM Reply and Exs. 1-14 thereto.)

Finally, BLM acknowledges that, subsequent to the Decision to implement this ADC plan, the State of Arizona enacted A.R.S. § 17-301 (D) (1998), 5/ which prohibits the use of traps, snares, and poisons on public land, with certain exceptions not here relevant, but disputes the suggestion that the statute nullifies the Decision or requires BLM to prepare a new Plan. (BLM Reply at 22-23.) To the extent that BLM will conform its activities to the requirements of the amended State statute, 6/ it is clear

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5/ The statute provides:

"It shall be unlawful to take wildlife with any leghold trap, any instant kill body gripping design trap, or by a poison or a snare on any public land, including state owned or state leased land, lands administered by the United States Forest Service, the Federal Bureau of Land Management, the National Park Service, the United States Department of Defense, the State Parks Board and any county or municipality."

A.R.S. § 17-301 (D) (1998). Exceptions include wildlife takes by departments of health safeguarding human safety, aquatic management takes by the Arizona Game and Fish Department, rodent control, sport hunting, and takes for scientific research. A.R.S. § 17-301 (D) (1998). (Ex. 14 to BLM Reply.)

6/ The Board has been provided copies of the 1987 and 1989 Memoranda of Understanding (1987 or 1989 MOU) between BLM and APHIS (Exs. 12 and 13 to BLM Reply), the 1991 Memorandum of Understanding between the Arizona Game and Fish Commission (AGFC) and APHIS (1991 MOU), and the 1994 Cooperative Agreement No. 94-73-04-2062 (Cooperative Agreement) between the Arizona Department of Agriculture and APHIS. Pursuant to the 1987 and 1989 MOU's, BLM and APHIS agreed to jointly develop and conduct ADC on BLM lands in coordination with appropriate State agencies. (Sec. IV.A.3 of 1989 MOU; Sec. 5.0, A.1 of 1987 MOU.) Pursuant to the 1991 MOU, AGFC agreed to assist in the development, conduct and evaluation of APHIS' ADC programs in Arizona and to "enforce compliance of all parties with Arizona Revised Statute Titles 3 and 17," as well as "solicit ADC involvement in the development of Arizona Game and Fish Department programs that affect [APHIS] operations in Arizona." (Sec. III.A.1 and .3 of 1991 MOU.) The 1994 Cooperative Agreement pledges mutual cooperation between APHIS and the State in the form of the funding, facilities, and personnel necessary to conduct ADC in the State, with the understanding that all operations shall receive the joint concurrence of APHIS and the State, through its Department of Agriculture. (Article 3a and 3c of the Cooperative Agreement.) APHIS and the State further agreed that the laws of the State "shall apply to questions arising under this Agreement unless the laws of the United States require otherwise." (Article 3t of the Cooperative Agreement.) It is unclear whether Appellant's argument regarding the effect of the new Arizona statute on the lethal methods permitted by the Plan is based on these agreements. However, BLM's authority to conduct ADC on Federal lands is derived from FLPMA, 43 U.S.C. § 1701 (1994), and not state law, and an agreement to cooperate with the State and coordinate like activities alone does not alter or diminish that authority.

that it does not bar the use of other lethal and nonlethal methods that the Plan envisions, including aerial gunning, shooting, calling and shooting, trailing or decoy dogs and scare devices. Moreover, as BLM observes, the Plan does not dictate the use of specific methods in advance, but allows personnel to select methods as appropriate when an ADC situation arises. (BLM Reply at 23.) Whatever limits on lethal methods Arizona law may establish, it clearly does not nullify the Plan or negate the Decision and EA.

[1] Appellant bears the burden of proving its case by a preponderance of the evidence. This Board has elaborated upon the nature of that burden when a FONSI is challenged:

> [T]he Board will affirm a FONSI with respect to a proposed action if the record establishes that a careful review of environmental problems has been made, all relevant environmental concerns have been identified, and the final determination is reasonable. G. Jon Roush, 112 IBLA 293 (1990); Utah Wilderness Association, 80 IBLA 64, 78, 91 I.D. 165, 173-74 (1984). The record must establish that the FONSI was based on reasoned decision-making. Thus, one challenging such a finding must demonstrate either an error of law or fact or that the analysis failed to consider a substantial environmental problem of material significance to the proposed action. G. Jon Roush, supra at 298; Glacier-Two Medicine Alliance, 88 IBLA 133, 141 (1985). The ultimate burden of proof is on the challenging party and such burden must be satisfied by objective proof. Mere differences of opinion provide no basis for reversal. Red Thunder, Inc., 117 IBLA 167, 175, 97 I.D. 263, 267 (1990); G. Jon Roush, supra at 297-98.

Predator Project, 140 IBLA 161, 165 (1997), citing Owen Severance, 118 IBLA 381, 392 (1991).

We start with Appellant's argument that the Plan in this case is inconsistent with the preservation and multiple-use mandates in FLPMA, 43 U.S.C. §§ 1701(8) and 1702(c) (1994). The multiple ! use mandate in FLPMA requires a choice of the appropriate balance to strike between competing resource uses, recognizing that not every possible use can take place fully on any given area of the public lands at any one time, often necessitating a trade ! off between competing uses as "'multiple use' means * * * a combination of balanced and diverse resource uses," 43 U.S.C. § 1702(c) (1994). See Charles Blackburn, 80 IBLA 42 (1984) (allocation of forage between livestock and wildlife); California Association of Four ! Wheel Drive Clubs, 38 IBLA 361 (1978), aff'd, California Association of Four-Wheel Drive Clubs, Inc. v. Andrus, Civ. No. 79-1797-N (S.D. Cal. Aug. 5, 1980), aff'd, (10th Cir. Jan. 22, 1982) (closure of desert area to off ! road vehicle use). Adopting an alternative which permits the selective use of lethal corrective measures, rather than requiring control only by nonlethal means, does not violate the directives of FLPMA, 43 U.S.C. § 1701(a)(8) (1994), because the public lands and resources must also be managed to "provide food and habitat for fish and wildlife and domestic animals," 43 U.S.C. § 1701(a)(8)

(1994), recognizing "the Nation's need for domestic sources of minerals, food, timber, and fiber from the public lands." 43 U.S.C. § 1701(a)(12) (1994).

Appellant is correct in observing that BLM is required to establish the need for a control program. Regulation 40 C.F.R. § 1508.9(b) provides that an EA "[s]hall include brief discussions of the need for the proposal." To demonstrate the need for an ADC program on public lands, confirmed livestock losses and predator population data are required, and it is the asserted absence of data pertaining to the public lands that is at the heart of WDR's position. (SOR at 9.) See Utah Wilderness Association, 134 IBLA 395, 397 (1996). The Secretary's decision in Committee for Idaho's High Desert (CIHD), SEC 92-ID 101 (1992), expressly held that without population data on coyotes BLM could not reasonably define the impacts of the ADC program on the coyote population. (CIHD at 18-19.) In the CIHD decision, the Secretary remanded an EA with instructions to BLM to "provide * * * sufficient evidence and analysis of predation losses to justify the level of ADC program activities." (CIHD at 20.) Thus, in Predator Project, 127 IBLA 50, 53-54 (1993), the record showed an extremely low level of reported losses (four sheep lost to coyotes on BLM lands). The Board held that BLM had not shown sufficient need for an ADC program. Here, although BLM acknowledges that it has not collected data relative to the public lands because of the lack of an ADC program in previous years, the record shows that BLM has analyzed information and data regarding predator damage in Arizona in general (EA at 14) and the Phoenix District in particular (EA at 12-15, Appendix 1 to EA at 3). Our task therefore is to determine whether this data constitutes sufficient evidence to support BLM's environmental analysis as required by CIHD, supra.

In Table 1, the EA presented livestock losses reported to APHIS of 476, 346, and 444 animals in 1990, 1991, and 1992, respectively, in the four counties in or partly within the Phoenix District. The value of these losses was approximately $349,431. (EA at 13.) Pinal, Maricopa, Yavapai, and Mohave counties also embrace the largest acreage of Federal land, intermingled with lands of other ownership. (EA at 11-12; Ex. 5 to BLM Reply.) Data compiled by the National Agricultural Statistics Service show total cattle/calf losses in 1991 and sheep/lamb losses in 1990 statewide, presented as Tables 2 and 3. (EA at 14; Exs. 1-3 to BLM Reply.) Thus, in 1991, 3,200 cattle and calves were lost to coyotes in the State, compared to 136 cattle and calves in the Phoenix District (about 4.5 percent of the State total), and 1,400 cattle and calves were lost to mountain lions, compared to 104 (about 7.5 percent of the State total) in the Phoenix District. (EA at 13-14; Ex. 2 to BLM Reply.) In 1990, a total of 7,700 sheep and lambs were lost to coyotes and 400 were lost to mountain lions in the State, compared to 117 sheep and lambs lost to coyotes (about 1.5 percent of the State total) and 28 lost to lions in the Phoenix District (7 percent of the State total). (EA at 13-14; Ex. 1 to BLM Reply at 4.)

It is important to note BLM's unrebutted averment that the data contained in Table 1 likely are understated because they do not include losses on BLM lands, there having been no formal ADC program on public

lands, and except for Yavapai County, there had been no other cooperative agreement with Phoenix District counties and no funding. Table 1 also does not include losses that are never reported to APHIS. (EA at 14.) These statistics clearly are more substantial than the four losses the Board rejected in Predator Project, 127 IBLA at 53-54. Moreover, the additional information submitted as exhibits to the BLM Reply provides further support for the EA analysis and conclusions, unlike the situation in CIHD, supra, where there was "no information on the numbers of livestock lost to predation in recent years upon which the BLM could base its conclusions for the level of ADC activities needed in the Boise District." (CIHD, supra at 11.) Accordingly, we find that there is ample evidence that significant predation occurs in the District. Appellant nonetheless dismisses the Tables because "they contain no facts directly reporting losses on the BLM lands in the Phoenix District." (SOR at 10.) In the absence of predation data specific to BLM-administered lands, we must decide whether it was improper to rely upon data pertaining to predation losses in the State, and whether BLM's analysis of that data is sufficient to justify the level of ADC activity proposed. (CHID, supra at 20.)

As an initial matter, it must be noted that Appellant has not provided or cited any evidence or scientific principle which demonstrates or suggests error in assuming, as BLM has, that predation occurs on Federal lands to the same general extent as it occurs on the State and private lands with which the public lands are intermingled. Indeed, to argue that BLM's assumption is unfounded strikes a counter-intuitive note because it is undisputed that prey animals are on the land. Instead of evidence or relevant scientific authority, however, WDR argues:

> This assumption is based on the similarity between the reported lands, with uses unidentified in the EA, and BLM lands. However, BLM lands are not used or managed identically to surrounding public and private lands. For example, state lands are unsupervised, as Arizona has no field personnel overseeing their use. BLM lands are managed under a multiple use scheme, unlike other public and private lands.

(SOR at 10.) We find this argument unpersuasive. Irrespective of how the lands are managed, supervised or owned, there is no question that Federal, state, and private lands are intermingled in the Phoenix District, or that grazing allotments embrace all three types of lands. Moreover, the Phoenix District comprises 56 percent of the area of Arizona and 43 percent of the BLM lands in the State; the greatest amount of grazing occurs in the District; and it contains 60 percent of the State's mountain lion habitat. (BLM Reply at 7-8.) These essential facts, coupled with the known hunting and behavioral characteristics of coyotes and mountain lions, provide substantial support for BLM's reasoning that the predation occurring on nearby State and private lands occurs on BLM lands as well. We conclude that more than a general comment on the differences between the way the lands in the District are owned, used, managed, and supervised is necessary to show that BLM's reasoning is unsound.

To the extent BLM drew its conclusions from other available data, WDR criticizes BLM for failing to interpret loss figures in terms of total numbers of grazing animals held by an individual operator or in a vicinity. (SOR at 11.) Appellant further attacks the EA on the ground that it utilized unverified loss information that was derived from voluntary reports of livestock operators. (SOR at 12.) With respect to the first contention, the basic data by which Appellant could compute and compare percentages of losses in Phoenix District counties and the State was provided in the EA. We perceive no reversible error in failing to provide it in percentage form, particularly since BLM rejected the idea of requiring livestock operators to meet a threshold of losses because of the potential hardship to smaller operators and the difficulty of administering an ADC program based on a loss threshold. (EA at 5-6.)

As to the contention that the loss data are not verified, Appellant claims that the Arizona Game and Fish Department (AGFD) reported only 67 depredations in 1993 and 1994 for the State, reasoning that the AGFD data are complete and correct, and that BLM's figures therefore must be incorrect. (Reply at 6.) In rebuttal, BLM states that AGFD has no general duty to collect or maintain predation data. (BLM Reply at 6.) It must be noted, moreover, that the argument is belied by an agreement between the State and APHIS, which expressly finds that "a responsible, effective and humane ADC program for Arizona is both necessary and desirable." (1991 Memorandum of Understanding between the State Game and Fish Commission and APHIS, Art. III.C.1.) That finding in turn comports with the loss data provided in the EA, and thus we decline to entertain Appellant's argument in the absence of any evidence suggesting that the information is untrustworthy or, by implication, that the State's conclusion in the Memorandum of Understanding is without a factual basis. We therefore assume that APHIS and the U.S. Department of Agriculture (USDA) have verified the data reported in accordance with the methodology described in the underlying USDA data. (Ex. 1 to BLM's Reply at 2, Reliability; Ex. 2 to BLM Reply at 21, Reliability.)

WDR's final point in this line of argument is that the decision to postpone implementation of a preventive control program until after BLM has had 2 years to collect the data necessary to establish the need for preventive control constitutes an admission that BLM lacked the data required to establish the need for any ADC. (Reply at 6.) We believe that Appellant's argument goes too far, because we agree with BLM that the argument fails to adequately distinguish between corrective control and preventive control. The EA envisions "[c]orrective control (to stop ongoing depredation)" as the primary objective of the Plan, carried out within an area and time close to the confirmed loss, and hence the need for control is demonstrated. "Preventive control," on the other hand, is designed to "prevent animal damage in areas where it has occurred previously," but is not presently occurring, and will be available only against coyotes, and only after BLM has collected baseline data over a 2-year period. Thus, corrective ADC activities inevitably will provide the factual predicate for a preventive control program, but we do not agree that to acknowledge as much is, as WDR argues, an admission that BLM lacks <u>any</u> reliable information regarding predation in the Phoenix District.

WDR next argues that livestock operators can and should protect their own livestock without assistance. (SOR at 12.) Appellant asserts that ADC, and particularly lethal control, is expensive and inappropriately places the financial burden of protecting livestock populations on the nation's taxpayers, rather than the local ranchers who directly benefit from it. (SOR at 13.) As the EA notes, however, use of APHIS' services will depend upon the execution and funding of cooperative agreements. When the EA was published, there were only two agreements in place in the Phoenix District, and in the two counties concerned, there is little BLM land. BLM projects no significant change in the degree of ADC in the District even if additional cooperative agreements are executed and funded, reasoning that since operators can legally conduct ADC under Arizona law, they will either continue to do so or simply transfer the dollars they have allocated for that purpose to APHIS through the cooperative agreement. (EA at 22.) While Appellant's concern is not frivolous, "NEPA does not require a particularized assessment of non-environmental impact." Idaho Conservation League v. Mumma, 956 F.2d 1508, 1522-23 (9th Cir. 1992). Thus, use of Federal tax dollars for ADC does not establish that the EA is inadequate or that BLM failed to examine the environmental consequences of conducting ADC. Inland Empire Public Lands Council v. Schultz, 992 F.2d 977, 980 (9th Cir. 1993); Idaho Natural Resources Legal Foundation, Inc., 115 IBLA 88, 90-91 (1990).

WDR further argues that BLM has failed to demonstrate the need for lethal methods, asserting that the reason for applying different control methods to coyotes and other predators is unexplained (SOR at 14); that there is no evidence of the effectiveness of lethal corrective ADC on coyotes (SOR at 14); that "[t]he proposed methods include a variety of strategies inappropriate to the corrective focus" (SOR at 14); and that there is no "evidence demonstrating the superiority of lethal control over non-lethal methods." (SOR at 15.) We do not agree. First, it is not correct that the EA failed to explain the reasons for utilizing different control methods for different predators, as is evident from our discussion of corrective and preventive ADC activities. Second, corrective ADC seeks to eliminate the individual predator or a local population of predators as close in time to the predation as possible, whereas preventive ADC would be implemented in situations where confirmed depredations have occurred, but before they resume. (EA at 7.) When corrective control is the objective and an offending predator is taken, there would seem to be little room to question whether lethal methods are an effective and appropriate means of ADC. For that reason, Appellant's concerns regarding which method should be used in a given case are best addressed by allowing control personnel a full range of lethal and nonlethal strategies to implement as actual circumstances warrant.

WDR next suggests that assistance in the use of nonlethal control strategies is not the equal of assistance to be provided in employing lethal means of control, complaining that "[n]o explanation is given for why non-lethal methods * * * merit the agency's assistance, but are not given any greater priority." (SOR at 15.) This assertion is not borne out by the EA, which states that "[b]oth non-lethal techniques and husbandry

practices will be used and emphasized as opportunit[ies] occur, and effort will be made to find those opportunities." (EA at 6.) BLM anticipates limited success with such techniques, however, because they are not well-suited to minimally managed, open range livestock operations and predator movements. Specifically, the EA concluded:

> Cattle are confined only in the sense that they cannot leave the allotment, which consists of an average of 13,700 acres, but may be as large as 200,000 acres. Under such circumstances, non-lethal techniques such as scare devices have very limited utility. Animal husbandry techniques that can reduce predation (enclosed calving, herding, keeping animals out of predator habitat) are likewise not easily applied, as facilities needed to carry them out (barns, corrals, fencing) are not available and not practical to construct from a cost perspective. This renders such methods, in most situations, inappropriate and impractical, as they cannot reduce predation significantly.

(EA at 6.) Appellant identifies two means which could be required as grazing permit conditions, suggesting that livestock operators should bear the cost of constructing enclosures to protect their animals. (SOR at 17.) In addition, it is argued that BLM's conclusions regarding the impracticality of taste aversion are unsupported. (SOR at 18-19.) As to the latter contention, assuming that it is true, we find WDR's claim that taste aversion is an effective strategy on the open range to be equally unsupported. What is more important, however, is that both arguments plainly ignore BLM's stated intention to use nonlethal means and husbandry techniques whenever a practical opportunity arises.

Similarly, WDR further argues that the corrective control methods identified in the EA "are primarily nonspecific and may only potentially be capable of short-term, preventative control (random killing to deplete population overall)[,] but in no way are capable of corrective use. Traps, snares, aerial gunning and M44s all kill indiscriminately, as shown by ADC's yearly kill figures." (SOR at 16.) The data to which the argument refers appears in the EA as Table 4. (EA at 16.) We assume that the term "nonspecific," contrasted with the reference to methods which "kill indiscriminately" and Table 4, is intended as an allusion to methods that can or will kill only the animal species intended. If such means exist, WDR has failed to identify them, and assuming that there is no "specific" lethal method in the sense conveyed by Appellant, the question is whether use of the lethal means identified in the EA, in the manner described, results in widespread killing of target and nontarget species alike as WDR suggests. As noted, WDR relies on Table 4 as evidence of the correctness of its argument, but we draw the opposite conclusion. The total number of animals taken by APHIS during 1991, 1992, and 1993 was 1,074. Of these, 68 (or 6.3 percent) were nontarget animals, 61 of which (or 89.7 percent) were released. Thus, 7 nontarget animals (or 10.3 percent) were killed, including a juvenile mountain lion that was accidentally trapped and killed by an adult lion before it could be released. Most of the nontarget species taken were feral dogs (25) and cats (25), and all

but 3 of them were released. Accordingly, we find that the record does not support the allegation that use of the lethal means identified in the manner and circumstances described in the EA will result in indiscriminate killing.

Appellant's next argument is that the EA is inadequate in that it failed to consider cumulative impacts of ADC actions on the coyote population because it lacks "specific documentation" of the size of the population. (SOR at 19.) According to Appellant, BLM improperly relied upon a population estimate based upon average coyote densities and the acreage within the Phoenix District. (SOR at 19-20.) Further, WDR alleges that the EA failed to consider the impacts of ADC in light of sport hunting, coyote killing contests, fur-trapping and private ADC activities. (SOR at 20.) The EA stated that coyotes are found throughout the Phoenix District, and that their numbers fluctuate within and between years:

> Highest populations occur during the brief period when pups are in the dens and shortly thereafter, when they reach a statewide average of three per square mile. Populations are much lower through the winter and just before whelping, when they average perhaps one per square mile. These numbers may vary between years, but represent an acceptable estimate over a long period of time.
>
> With a total area of approximately 113,000 square miles, Arizona would have between 113,000 and 339,000 coyotes during the year. Based on the above average densities and the total land acreage within the District, coyote populations within the Phoenix District, in any year, range from a low of around 61,000 animals to a high of around 183,000 animals. Populations on BLM administered public lands in the District would range from lows of around 9,500 animals to highs of around 28,500 animals. Coyote populations on public lands within grazing allotments in the District range from lows of approximately 7,700 animals to highs of approximately 23,000 animals, depending on the time of year.

(EA at 15, 17.) Because coyotes are widespread and free-ranging, they may be viewed as one large population. (EA at 17.)

[2] It is true that BLM is unable to state what the actual coyote population is at any point in time, and we assume that neither WDR nor the sources and authorities cited in the EA presently possess this information, or it would have been presented in the EA or in this appeal. This Board considered the same issue in Predator Project, supra. In that case, the appellant contended that BLM had no adequate base-line data on predator populations, and that its estimates were based on general information of poor quality. Although the appellant purported to accept the infeasibility of collecting site-specific data on all coyote populations, it nonetheless argued that the BLM District should have conducted a survey. The Board's response applies to the present appeal with equal force:

> There is no question that a census of the entire state and local coyote and red fox populations would be preferred.

> Absent a census, however, the question is whether the means employed to estimate these populations or the impact of predator management on the public lands in this case is so flawed that the information must be rejected.
>
> Appellants are required to show by a preponderance of evidence that the methods employed are erroneous as a matter of fact or law. The showing necessary to carry the burden of proof is more than a recitation of all the questions that a census could answer definitively. Appellants have not offered the population figure or data they believe is more accurate, and they similarly have not identified a method short of a census that would produce a more reliable estimate. Appellant [Predator Project] criticizes some of the data and studies BLM used because they were collected or conducted in jurisdictions other than Montana, but has not shown that such data are wholly inapplicable to, or invalid in, Montana.

Predator Project, 140 IBLA at 169.

WDR finds itself in precisely the same position in that it has offered nothing more than its observation that BLM lacks the information a census could provide. Like the Predator Project, Appellant has neither offered population figures or data it believes to be more accurate nor identified a method short of a census by which a better estimate could be obtained, and it certainly has not articulated any factual, analytical, or scientific flaw in the manner in which the estimate was calculated. We conclude that the lack of data regarding losses specific to the public lands within the District is not per se fatal. In this case, the losses in the Phoenix District are reasonably well-documented, the public lands are closely intermingled with State and private lands, the grazing allotments embrace lands of mixed ownership, and Appellant has submitted no countervailing evidence or scientific authority demonstrating error in BLM's analysis of the available data or its reasoning.

The claims that BLM considered neither the impact of ADC in conjunction with all other coyote takes nor its long-term impact are without merit. The relevant data are presented in the EA as Tables 4, 5, and 6, and are discussed in the EA at 16-19. In particular, the EA noted research studies which showed that coyote populations rebound from ADC activities rapidly, due to increased litter size and breeding at younger ages. (EA at 17.) The EA analyzed the issue as follows:

> For the sake of this analysis, it will be assumed that the control program under the proposed action would eventually reach a level that would take approximately three times the average number of coyotes taken on an annual basis on other land ownerships as reported by [APHIS] in Table 4. That average annual take is 312 animals, giving a projected take of 936 animals, which will be the rounded to 1000 for this analysis. Much of this take is already occurring (see Table 5), and would simply be carried out by [APHIS] rather than other entities. For this analysis, however, it will be considered to be additional take.

> * * * This level of take (1000 animals) represents between .55% and 1.64% of the total District coyote population, depending upon the time of year. It is impossible to state precisely what the percentage is because the population is changing constantly and the take would occur on a yearlong basis. If hunters and trappers take a similar percentage of the District's average coyote population as they do from the State annual average population (15% - see Table 5 and discussion in Affected Environment), they would take an annual average of approximately 18,300 coyotes. This level of harvest (plus an unknown animal damage control harvest on non-public lands) has occurred for a number of years.
>
> The combined hunter/trapping take and projected control take thus would be 19,300 animals. This equates to 10.6% and 31.6% of the District's high and low coyote population being taken by hunters, trappers and for damage control purposes in any given year. The actual amount is between these two figures, based on the dynamics of population. This level of take is well within the coyotes' biological capacity to overcome, based [upon] a study cited in *Animal Damage Control-Final Environmental Impact Statement* (page 4-12). The cited study indicated that coyotes have an allowable harvest level [footnote omitted] of 70%, that is, a coyote population can withstand an annual harvest of 70% without affecting the long-term maintenance of the species. The total of hunting, trapping and control take of coyotes in the District would not exceed 31.6% of the population (at its lowest level)[,] which is well within the 70% level cited above.

(EA at 23-24.) Thus, it is clear that BLM's estimates are predicated upon a conservative analysis and equally conservative parameters. Apart from its general allegations, Appellant has provided nothing which persuades us that the above analysis and reasoning should be rejected, and we therefore find that the ADC actions would not alone or in conjunction with other takes have a significant impact on predator populations.

Appellant's final charge is that BLM has not planned adequate measures to protect special status species, including proposed or listed threatened and endangered species and the Yuma puma. (SOR at 20-21.) Provisions of the BLM Manual are cited as support for the assertion that use of "nonspecific" measures could result in the taking of the Yuma puma 7/ or special status species. (EA at 21.) WDR does not purport to

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7/ Appellant expressed particular concern for the Yuma puma as a "Candidate 2" species in the Phoenix District. It was BLM policy to manage and protect such species as though they had been listed, except for formal consultations under the Endangered Species Act, 16 U.S.C. § 1531 (1994), BLM Manual § M6840.06B. However, the FWS discontinued designating category 2 species to "reduce confusion" about their conservation status, i.e., that they are not candidates for listing as threatened or endangered. 61 Fed. Reg. 7597 (Feb. 28, 1996). The Yuma puma is not currently a Federal threatened or endangered species.

address the particulars of the EA's analysis of possible impacts to the Yuma puma (EA at 25-26), BLM's reliance on a Biological Opinion (Appendix 2 to the EA) prepared by FWS, the initiation of subsequent consultation with FWS to ensure no special status species is overlooked, or BLM's commitment to incorporate the results of the subsequent consultation into the ADC program as they become available. (EA at 27.) Although Appellant offers general opinions to the contrary, its opinions are not sufficient to overcome the reasoned analysis of BLM's experts in matters within the realm of their expertise. King's Meadow Ranches, 126 IBLA 339, 342 (1993). Appellant therefore has failed to support "its challenges to the adequacy of BLM's environmental review with 'objective proof' [citations omitted]." Oregon Natural Resources Council, 116 IBLA 355, 360 (1990). See also Coy Brown, 115 IBLA 347, 357 (1990); Southern Utah Wilderness Alliance, 114 IBLA 326, 332 (1990).

We hold that BLM has considered the substantial environmental questions and taken the requisite hard look at the environmental consequences of undertaking an ADC program, and that it has made a convincing case that there will be no significant impact as a result of implementing control activities, in conformance with section 102(2)(C) of NEPA. See Humane Society of the United States v. Hodel, 840 F.2d 45, 62 (D.C. Cir. 1988); Southern Utah Wilderness Alliance, 114 IBLA at 332.

The last matter to be disposed of is Appellant's April 3, 1995, motion for oral argument based upon the assertedly complex factual and legal questions presented and recent Arizona law banning the use of certain traps and devices on state and Federal public lands. The motion was opposed and now is denied on the ground that the record presents no disputed issues of material fact requiring oral argument. To the contrary, the record herein provides a sound basis for deciding the appeal without oral argument. See The Sierra Club, 107 IBLA 96, 97 (1989). To the extent WDR has raised arguments not specifically addressed herein, they have been fully considered and rejected.

Therefore, pursuant to the authority delegated to the Interior Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the appeal in IBLA 95-61 is dismissed; the appeal in IBLA 95-459 is affirmed; and the motion for oral argument is denied.

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T. Britt Price
Administrative Judge

I concur:

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Will A. Irwin
Administrative Judge